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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

ALEJANDRO GALVEZ,

Defendant and Appellant.

B286807

(Los Angeles County
Super. Ct. No. BA432558)

APPEAL from a judgment of the Superior Court of Los Angeles County, Curtis B. Rappe, Judge. Affirmed.

Barbara A. Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven E. Mercer, Deputy Attorney General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendant and appellant Alejandro Galvez of first degree murder (Pen. Code,¹ § 187, subd. (a)) and willful, deliberate, and premeditated attempted murder (§ 664/187, subd. (a)). As to the murder conviction, the jury found true the allegations that defendant personally used and personally and intentionally discharged a firearm causing death. (§ 12022.53, subds. (b)-(d).) It further found true the special circumstance allegation that defendant committed the murder by means of lying in wait. (§ 190.2, subd. (a)(5).) As to the attempted murder conviction, the jury found true the allegations that defendant personally used and personally and intentionally discharged a firearm causing great bodily injury. (§ 12022.53, subds. (b)-(d).) It further found that he personally inflicted great bodily injury under circumstances involving domestic violence. (§ 12022.7, subd. (e).) The trial court sentenced defendant to life in prison without the possibility of parole plus 54 years.

On appeal, defendant contends there was insufficient evidence to support the lying-in-wait special circumstance. He further contends the matter should be remanded to the trial court to allow it to exercise its section 1385 discretion whether to strike the firearm enhancements under section 12022.53. We affirm.

¹ All statutory citations are to the Penal Code.

II. BACKGROUND

Defendant and David Duran worked as armed security guards for the same employer. They sometimes worked the same shift. Defendant and Duran were friends and socialized outside of work.

As of December 2014, Elizabeth H. had known defendant for about five years. They had been in a relationship for about three and a half or four years and had a four-year-old son together. Their relationship ended in September 2013.

While Elizabeth H. and defendant were in a relationship, they and their son lived together. Defendant's mother, sisters Yolanda and Laura, and niece Brenda Trujillo lived in the house next door. After Elizabeth H. and defendant's relationship ended, Elizabeth H. and her son continued to live in the same house and defendant moved out. When defendant moved out, he gave his house keys to Elizabeth H.

Elizabeth H. did not have any "issues" with defendant after their relationship ended. That started to change in May 2014, when defendant learned that Elizabeth H. was going out with friends after work—including Duran. Defendant became aggressive with Elizabeth H. and called her repeatedly.

Around September or October 2014, Elizabeth H. and Duran began a relationship. Elizabeth H. did not tell defendant about her relationship with Duran because she was afraid of his reaction. Duran told defendant, and defendant reacted badly. He called Elizabeth H. and asked, "Why him?" Elizabeth H. could hear that defendant was loading a gun.

The next day, Elizabeth H. encountered defendant when she dropped off their son at school. Defendant approached and

appeared to be mad. He grabbed his shirt and said he wanted to speak with Elizabeth H. Elizabeth H. was afraid. From the way defendant grabbed his shirt, she believed he was carrying a gun. She said she would not speak with him unless he showed her he had nothing under his shirt.

Defendant lifted his shirt and showed Elizabeth H. he did not have a gun. Defendant appeared to calm down and sat in the back seat of Elizabeth H.'s car. Defendant asked, "Why [Duran]?" Elizabeth H. responded that Duran treated her well which made her feel good and she liked him. Defendant slapped Elizabeth H.'s face hard and told her, "Just leave [Duran] and everything will be okay."

Elizabeth H. told defendant she would leave Duran because she was afraid of what defendant might do. Elizabeth H. spoke with Duran and told him "what was going on." He responded that nothing would happen as long as they were together.

After the incident at the school, defendant would come onto Elizabeth H.'s property. On one occasion, Elizabeth H. called the police. When defendant began entering Elizabeth H.'s property more often, Elizabeth H. felt afraid and unsafe. In their recent interactions, defendant had been aggressive and rude, calling her a bitch and a whore. In response, Elizabeth H. "got" a gun.²

Around December 28, 2014, defendant told a co-worker and mutual friend of his and Duran's that he was upset that Duran was dating Elizabeth H. and "that didn't sound like a friend to him." The co-worker advised defendant "to forget about everything that had happened and to let them do what they were

² Elizabeth H. initially testified that her daughter was going to buy her a gun for Christmas. She later testified that she did not receive a gun for Christmas.

doing.” Angry, defendant responded, “[Y]ou don’t do that to a friend and he had sent [persons] to fuck [Duran] up, but they couldn’t.” Immediately after that conversation, the co-worker called Duran and advised Duran of his conversation with defendant.

On December 30, 2014, Elizabeth H. was out with Duran and her son. At around 10:00 or 10:30 p.m., defendant called Elizabeth H. and asked to speak with their son. Elizabeth H. gave her phone to her son, but he said he did not want to talk. Elizabeth H. told defendant that he might be able to speak with their son when they got home.

When Elizabeth H., Duran, and Elizabeth H.’s son arrived at Elizabeth H.’s house, Elizabeth H. unlocked the front gate and parked on the property. Elizabeth H. unlocked the house’s front security door and interior door and they entered the house. Duran lay Elizabeth H.’s son, whom he was carrying, on the bed in Elizabeth H.’s bedroom.

Around this time, defendant called Elizabeth H. again and she told him that their son was asleep. Defendant’s tone of voice and demeanor sounded normal during the conversation.

When Elizabeth H. attempted to end one of her conversations with defendant, defendant said, “Why don’t you want to talk? I am sure you’re with your boyfriend, right?” Elizabeth H. confirmed that she was with Duran.

Because defendant repeatedly called Elizabeth H. thereafter, she blocked his calls and he could only send her text messages. At 10:23 p.m., defendant texted Elizabeth H. and asked if they were already in bed. At 10:52 p.m., he texted, “Hello.” At 11:25 p.m., defendant texted, “I am calling you, pick up.”

When defendant sent the last text, he was standing outside of Elizabeth H.'s house. Around that time, Elizabeth H.'s dogs were acting strangely, so she opened her bedroom curtains and saw defendant standing about four or five feet from the window. There were bars on Elizabeth H.'s windows.

Elizabeth H. told defendant to leave. Defendant said he only wanted to talk with her. Defendant's tone of voice and body language were "friendly." Elizabeth H. again asked defendant to leave, telling him they did not have anything to talk about. Defendant did not leave. Elizabeth H. called defendant's sister Yolanda and told her of her brother's presence and requested that she ask her brother to leave.

Both of defendant's sisters and his mother came outside and told defendant to leave. Defendant said he would leave after he spoke to Elizabeth H. Elizabeth H. did not go outside and speak to defendant because she was scared. At some point, defendant said to Elizabeth H., "Okay. Tell your boyfriend to come outside and open the door and then I will leave." Defendant repeated this request two or three more times.

When Duran heard defendant say he wanted Duran to come outside, Duran said, "Let me just go and open the door so he will go away." Duran's demeanor was calm. He did not appear to be frightened, aggressive, or angry. Elizabeth H. told Duran not to go outside.

Duran retrieved his work gun from a safe in Elizabeth H.'s bedroom closet. He gave the gun to Elizabeth H. and told her he was going outside to talk with defendant. He told her not to be afraid and to stay in the house.

Elizabeth H. was nervous and really scared about what was happening. She did not think to call the police—everything was

happening so fast. As Duran left the bedroom, Elizabeth H. was putting on her shoes. Duran was calm and assured Elizabeth H. that everything would be alright.

As Elizabeth H. was tying her shoes, she heard Duran unlock and open the front door and security door and say something to defendant. Within 20 to 30 seconds, Elizabeth H. heard Duran say, "Oh shit," and heard someone running into the house.

Elizabeth H. looked out of her bedroom and into the living room. She saw Duran running through the house to the back and heard loud noises she believed were gunshots. Defendant ran after Duran, but stopped when he saw Elizabeth H. Defendant was holding a gun.

Elizabeth H. tried to close the bedroom door, but defendant pushed the door open. Elizabeth H. could not remember if she fired Duran's gun. She heard five or six more gunshots. She felt weak and fell to a seated position on the floor. Defendant grabbed Elizabeth H. by the hair, put his gun to her head, and said, "I told you, bitch, you were not going to fool me." Elizabeth H. understood defendant's statement to mean that he was going to kill her.

By the time defendant held the gun to Elizabeth H.'s head, his mother, sisters, and niece had entered the bedroom. Laura told defendant to leave Elizabeth H. alone. Elizabeth H. said to defendant that their son was sleeping on the bed. Elizabeth H. could not remember if defendant responded. The only other thing he said to her was, "You're going to regret this."

Duran entered the room. He grabbed defendant by the arm and turned defendant toward him. Elizabeth H. heard another

gunshot and saw Duran fall dead on the floor. Laura yelled, “Look what you did.” Defendant did not respond.

Defendant grabbed Elizabeth H. again and Laura grabbed defendant. Elizabeth H. and Laura struggled with defendant over his gun. Elizabeth H. wrested the gun from defendant and threw it under the bed. Defendant dragged Elizabeth H. to the other side of the bed where he hit her head with the gun’s magazine several times.

Laura grabbed defendant, yelled at him to let Elizabeth H. go, and threw him towards the door. Defendant then pointed a second gun at Elizabeth H. His family members pushed his hands down and took him out of the house. As they were outside before the police arrived, Trujillo and her mother asked defendant why he “did it.” He responded, “I did it to get my honor back.”

A 911 call concerning shots fired at Elizabeth H.’s house was placed at midnight. Elizabeth H. waited in her bedroom until the police arrived. She was taken to the hospital; she had been shot three times—twice in the leg and once in the back. Duran sustained five gunshot wounds, three of which were fatal. Defendant, seated on the front steps next to his mother when the police arrived, was arrested.

III. DISCUSSION

A. *Lying in Wait*

Defendant contends that the jury’s lying-in-wait special circumstance finding was not supported by sufficient evidence. We disagree.

1. Standard of Review

“When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citation.] We determine ‘whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ [Citation.] In so doing, a reviewing court ‘presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.’ [Citation.] The same standard of review applies to the sufficiency of the evidence supporting special circumstance findings. [Citation.]” (*People v. Edwards* (2013) 57 Cal.4th 658, 715.)

2. Analysis

““The lying-in-wait special circumstance requires ‘an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage. . . .’ [Citations.]” [Citation.]” (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1073 [(*Mendoza*)]). Defendant contends the evidence was insufficient

to establish the concealment of purpose and watching and waiting elements.

a. Concealment of purpose

“““The element of concealment is satisfied by a showing “that a defendant’s true intent and purpose were concealed by his actions or conduct. It is not required that he be literally concealed from view before he attacks the victim.”” [Citation.]” [Citation.]” (*Mendoza, supra*, 52 Cal.4th at p. 1073.)

Defendant argues there was insufficient evidence that he concealed his true intent and purpose because there was no evidence of a substantial pause when Duran went to the front door during which defendant “sought to lull [Duran]’s suspicions.” We disagree with defendant’s suggestion that the evidence of concealment should be limited to the period that defendant and Duran interacted at the front door. Instead, that period includes all the time defendant was present at Elizabeth H.’s house and attempted to conceal his true intent and purpose—to murder Duran and Elizabeth H.—and thereby gain access into Elizabeth H.’s house.

When defendant stood outside Elizabeth H.’s bedroom window and texted her at 11:25 p.m., he knew she was with Duran. Yet, despite defendant’s displeasure about Elizabeth H.’s relationship with Duran, defendant’s tone of voice and body language were “friendly” when he spoke with Elizabeth H. Defendant said he only wanted to talk with Elizabeth H. When defendant’s sisters and mother tried to get defendant to leave, he said he would leave once he spoke with Elizabeth H. When Elizabeth H. would not speak with defendant, defendant said

that Elizabeth H. should have Duran open the door and then he would leave.

Although Elizabeth H. was afraid and Duran was at least concerned—he gave his gun to Elizabeth H. before he went to the door—defendant’s concealment worked. Defendant sufficiently lulled Duran to cause Duran to open the front door and security gate thereby providing defendant with access into Elizabeth H.’s home so he could murder Duran and Elizabeth H. If defendant had not sufficiently lulled Duran, defendant could not have gained access to the home as the windows were barred. That Duran went to the front door unarmed and his comment when defendant began his attack—“Oh shit”—demonstrates that defendant successfully caught Duran off guard. Accordingly, there was sufficient evidence of concealment of purpose. (*Mendoza, supra*, 52 Cal.4th at p. 1073.)

b. Watching and waiting

“As for the watching and waiting element, the purpose of this requirement ‘is to distinguish those cases in which a defendant acts insidiously from those in which he acts out of rash impulse. [Citation.] This period need not continue for any particular length “of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation.” [Citation.]’ [Citation.]” (*Mendoza, supra*, 52 Cal.4th at p. 1073, fn. omitted.)

Defendant contends the evidence was insufficient to prove a substantial period of watching or waiting because his encounter with Duran at Elizabeth H.’s front door lasted from 20 to 30 seconds before he shot Duran. Instead, defendant was on

Elizabeth H.’s property for approximately 30 minutes before he shot Duran. At 11:25 p.m., defendant texted Elizabeth H. from her property—outside of her bedroom window. The shooting took place around midnight.

Although defendant’s presence was known during that approximate 30-minute period,³ defendant used that time to try to secure access to Duran and Elizabeth H. As explained above, he used that time to try to lull them into a false sense of security thereby creating “an opportune time to [attack].” (*Mendoza, supra*, 52 Cal.4th at p. 1073.) Thus, defendant’s 30 minutes of watching and waiting on Elizabeth H.’s property demonstrate that he acted “insidiously” and not “out of rash impulse.” (*Ibid.*)

B. *Senate Bill No. 620*

Defendant contends remand is necessary so that the trial court may exercise its discretion whether to strike the firearm enhancements pursuant to section 12022.53, subdivision (h).⁴

³ A defendant’s presence need not be concealed from his victim while watching and waiting. (See *People v. Morales* (1989) 48 Cal.3d 527, 555, disapproved on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 459 [“[T]he evidence was sufficient to support a finding of lying-in-wait murder, based on defendant’s watchful waiting, from a position of advantage in the backseat, while the car was driven to a more isolated area, and his sudden surprise attack, from behind and without warning, on [the] victim”].)

⁴ “The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any

Subdivision (h) of section 12022.53 became effective January 1, 2018, pursuant to Senate Bill No. 620. (Stats. 2017, ch. 682, § 2.) Prior to Senate Bill No. 620, a trial court lacked discretion to strike or dismiss a firearm enhancement pursuant to section 12022.53. (*People v. Chavez* (2018) 22 Cal.App.5th 663, 708; *People v. Arredondo* (2018) 21 Cal.App.5th 493, 506.) The Attorney General concedes that Senate Bill No. 620 applies retroactively to defendant and that defendant therefore “should be given a new sentencing hearing at which the trial court can consider whether to strike the firearm enhancements.” While we agree that Senate Bill No. 620 applies retroactively (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091; *People v. Robbins* (2018) 19 Cal.App.5th 660, 679), we disagree that remand is necessary in this case. Based on the nature of the convictions, the evidence presented at trial, and the sentence imposed by the trial court, that is, two consecutive terms of life without the possibility of parole, the possibility that the trial court would strike or dismiss the firearms enhancements would be so remote as to make a remand unnecessary.

resentencing that may occur pursuant to any other law.”
(§ 12022.53, subd. (h).)

IV. DISPOSITION

The judgment is affirmed.

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KIM, J.

We concur:

RUBIN, P. J.

BAKER, J.